



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations
of International Humanitarian Law
Committed in the Territory of the
former Yugoslavia since 1991

Case No.: IT-05-88-T
Date: 21 April 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost
Judge Ole Bjørn Støle – Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 21 April 2008

PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

PUBLIC

**DECISION ON PROSECUTION MOTION FOR ADMISSION OF
EVIDENCE PURSUANT TO RULE 92 QUATER**

Office of the Prosecutor

Mr. Peter McCloskey

Counsel for the Accused

Mr. Zoran Živanović and Ms. Mira Tapušковиć for Vujadin Popović
Mr. John Ostojić and Mr. Christopher Meek for Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Drago Nikolić
Mr. Aleksandar Lazarević and Mr. Christopher Gosnell for Ljubomir Borovčanin
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Milan Gvero
Mr. Peter Haynes and Mr. Đorđe Sarapa for Vinko Pandurević

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”), is seised of the “Prosecution’s Motion to Admit the Evidence of [B-161 from *Prosecutor v. Milošević*, Case No. IT-02-54-T (“B-161”)], Bojanović, Marić, and Deronjić Pursuant to Rule 92 *quater* with Confidential Appendices A – I”, filed confidentially on 29 January 2008 (“Motion”), and hereby renders its decision thereon.

I. SUBMISSIONS OF THE PARTIES

A. Motion

1. In its Motion, the Prosecution requests that the Trial Chamber admit the prior testimony of four deceased persons, B-161, Ljubo Bojanović, Milan Marić and Miroslav Deronjić (“four deceased”). The Prosecution also seeks to admit all documents not already in evidence that were relied upon in the prior testimony of the deceased witnesses.¹

2. In particular, the Prosecution requests the admission into evidence of B-161’s testimony and related documents in *Prosecutor v. Milošević* (“B-161’s testimony” and “B-161’s exhibits”, respectively),² Ljubo Bojanović’s testimony and related documents in *Prosecutor v. Blagojević and Jokić* (“Bojanović’s testimony” and “Bojanović’s exhibits”, respectively),³ Milan Marić’s testimony and related documents in *Prosecutor v. Blagojević and Jokić* (“Marić’s testimony” and “Marić’s exhibits”, respectively),⁴ and Miroslav Deronjić’s testimony and related documents in *Prosecutor v. Blagojević and Jokić* (“Deronjić’s testimony” and “Deronjić’s exhibits”, respectively).⁵

3. The four deceased were listed in the Prosecution’s Confidential Provisional Witness List of 16 December 2005 (“Confidential Provisional Witness List”).⁶ B-161, who was referred to in the

¹ Motion, para. 1.

² *Prosecutor v. Milošević*, Case No. IT-02-54-T, MT. 21002-21104 (private session in portions) (22 May 2003); MT. 21105-21134 (private session in portions) (23 May 2003); MT.23619-23683 (closed session) (2 July 2003) (“B-161’s testimony”). *See also*, Appendix E indicating B-161’s testimony and the related documents requiring Rule 65 *ter* number (“B-161’s exhibits”).

³ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11668–11751 (8 July 2004); BT. 11752–11775 (9 July 2004) (“Bojanović’s testimony”). *See also*, Appendix E indicating Bojanović’s testimony and related documents requiring Rule 65 *ter* number (“Bojanović’s exhibits”).

⁴ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11542-11572 (6 July 2004); BT. 11573-11667 (7 July 2004) (“Marić’s testimony”). *See also*, Appendix E indicating Marić’s testimony and related documents requiring Rule 65 *ter* number (“Marić’s exhibits”).

⁵ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 6131–6207 (19 January 2004), BT. 6216–6300 (20 January 2004), BT. 6305–6392 (21 January 2004), BT. 6398–6510 (22 January 2004) (“Deronjić’s testimony”). *See also*, Appendix E indicating Deronjić’s testimony and related documents requiring Rule 65 *ter* number (“Deronjić’s exhibits”).

⁶ Prosecution’s Notice of Filing [of] Provisional Witness List, confidential, 16 December 2005 (“Confidential Provisional Witness List”), Annex A, at pp. 4–5.

Confidential Provisional Witness List as PW-102 for purposes of this case,⁷ died a day before the filing of the Prosecution Rule 65 *ter* Witness List.⁸ Bojanović, Marić, and Deronjić died during the course of the *Popović et al.* trial.⁹

4 The Prosecution argues that the four deceased persons' evidence meets the requirements for admissibility under Rule 92 *quater* because B-161, Bojanović, Marić, and Deronjić are unavailable, their prior testimony is reliable and the requirements of Rule 89 (C) and (D) are met.¹⁰ The Prosecution notes that the testimony of the four deceased relate to the acts and conduct of one or more Accused but submits that "the interests of justice support the admission of their prior testimony in its entirety."¹¹

5 Because the prior testimony of the deceased persons and 26 of the documents referenced therein were not included on the Prosecution's original Rule 65 *ter* Exhibit List, the Prosecution also seeks leave pursuant to Rule 73 *bis* to amend its Rule 65 *ter* Exhibit List to add these materials.¹² In support of its request to amend its Rule 65 *ter* Exhibits List, the Prosecution first argues that there is no prejudice to the Defence as just 7 of the 26 documents at issue have been disclosed to the Defence only recently, on 25 and 28 January 200[8] and these documents "either are not directly relevant to the issues raised in this case or are cumulative of other evidence already before the Trial Chamber", and, in any event, the Defence has been on notice of all the documents since the disclosure of the deceased's testimony.¹³ Second, the documents are *prima facie* relevant and of probative value.¹⁴

6 The Prosecution also seeks leave to exceed the word-limit for motions because the Motion requires discussion of Rule 92 *quater* and case law as applied to the proposed evidence of the four deceased.¹⁵

B. Defence Responses

7 On 7 February 2008, the Defence sought additional time to respond to the Motion. The Trial Chamber granted the request and set the deadline to file any response to the Motion by 22 February 2008.¹⁶

⁷ Confidential Provisional Witness List, Annex A, p. 5.

⁸ Motion, para. 7. Appendix A includes B-161's death certificate.

⁹ *Ibid.*, para. 7. Appendixes B to D include the death certificates of Bojanović, Marić and Deronjić, respectively.

¹⁰ *Ibid.*, paras. 3, 27, 30–44, 45–46.

¹¹ *Ibid.*, para. 2.

¹² *Ibid.*, para. 3.

¹³ *Ibid.*, para. 49–51. Appendix E also indicates the disclosure dates of the prior testimony and related documents.

¹⁴ *Ibid.*, paras. 52–55.

¹⁵ *Ibid.*, para. 4.

8. On 22 February 2008, Nikolić, and Borovčanin confidentially filed their responses (“Nikolić Response”¹⁷ and “Borovčanin Response”¹⁸ respectively) and Beara and Miletić jointly filed a response (“Beara and Miletić Response”¹⁹). On 26 February 2008, Gvero filed his confidential response (“Gvero Response”).²⁰

1. Beara and Miletić Response

9. In their joint Response, Beara and Miletić request that the Motion be denied. They oppose the Motion with respect to the admission of the testimony and supporting documents of all four deceased witnesses, but in particular B-161 and Deronjić. In addition, they oppose the Prosecution’s request to amend its Rule 65 *ter* Exhibit List on the ground that the Prosecution has not followed the proper procedure.²¹

10. Beara and Miletić also seek leave to exceed the word-limit for motions as the Motion requires a discussion of Rule 92 *quater* and case law as applied to B-161 and Deronjić.²²

11. Beara and Miletić concede that B-161 and Deronjić are unavailable persons in accordance with Rule 92 *quater*. They argue, however, that the evidence is unreliable, does not satisfy the requirements of admissibility pursuant to Rule 92 *quater* or Rule 89, and admission would undermine the fairness of the proceedings.²³

12. They contend that evidence concerning the acts and conduct of the Accused, and central to the Prosecution’s case, which is not corroborated and consistent should be deemed unreliable within the meaning of Rule 92 *quater*.²⁴

¹⁶ *Popović et al.*, T. 21192–21193 (7 February 2008).

¹⁷ Defence Response on Behalf of Drago Nikolić to Prosecution’s Motion to Admit the Evidence of [B-161], Bojanović, Marić, and Deronjić Pursuant to Rule 92 *quater*, confidential, 22 February 2008 (“Nikolić Response”).

¹⁸ Borovčanin Defence Response to “Prosecution’s Motion to Admit the Evidence of [B-161], Bojanović, Marić, and Deronjić Pursuant to Rule 92 *quater* with Confidential Appendices A – I”, confidential, 22 February 2008 (“Borovčanin Response”).

¹⁹ Ljubiša Beara and Radivoje Miletić’s Joint Defence Response to the Prosecution’s Motion to Admit the Evidence of [B-161], Bojanović, Marić, and Deronjić Pursuant to Rule 92*quater* with Confidential Appendix A, confidential, 22 February 2008 (“Beara and Miletić Response”).

²⁰ Response on Behalf of Milan Gvero to the Prosecution’s 92 *quater* Motion, confidential, 26 February 2008 (“Gvero Response”).

²¹ Beara and Miletić Response, paras. 2, 4, 38, 44.

²² *Ibid.*, para. 5.

²³ *Ibid.*, paras. 8, 9, 19, 31–32. They submit that the evidence lacks probative value because of its unreliability and that the admission of the evidence would violate Rule 89(C). They further submit that since the testimony of both B-161 and Deronjić are central to the Prosecution’s case and have been shown to be unreliable, their admission would constitute a violation of Rule 89(D). *Ibid.*, paras. 31–32.

²⁴ *Ibid.*, paras. 11–18, referring, *inter alia*, to *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Decision on Prosecution’s Motion to Admit Five Statements of Witnesses 1 Into Evidence Pursuant to Rule 92 *quater* with Confidential Annex, 28 November 2007, para. 11; and *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Reasons

13. They submit that the prior testimony of B-161 is unreliable as it relates to the acts and conduct of the Accused,²⁵ is uncorroborated,²⁶ and lacks sufficient and meaningful cross-examination.²⁷ They refer to the Appeals Chamber Judgement in *Krstić* in which Deronjić's reliability had been called into question.²⁸ They also refer to the reservations with respect to the credibility of Deronjić's evidence expressed by the Trial Chamber in the *Deronjić* case.²⁹ Noting revelations by Momir Nikolić, originally a witness for the Prosecution, about feeling pressured by the Office of the Prosecutor during the plea negotiation process and the impossibility of cross-examining Deronjić to determine if he was treated in the same way, Beara and Miletić submit that any statements made by Deronjić after his plea negotiations should be handled with "extreme caution".³⁰

14. Beara and Miletić oppose the Prosecution's request to amend its Rule 65 *ter* Exhibit List on the ground that the Prosecution should have filed a motion to add B-161 onto its Rule 65 *ter* Witness List, in accordance with Rule 73 *bis* (F), before requesting that the Trial Chamber admit B-161's testimony pursuant to Rule 92 *quater* and grant leave to amend the Rule 65 *ter* Exhibit List.³¹ They further submit that B-161 and Deronjić should have been listed as Rule 92 *quater* witnesses on the Prosecution's Rule 65 *ter* Witness List in accordance with Rule 65 *ter* (E).³² The two Accused submit that the Prosecution is violating the Rules and is "attempting to gain an undue advantage over the Accused as the Joint Defence now has less time to analyse the new evidence and prepare its case".³³ They further claim that their rights are prejudiced in that the Prosecution has waited an "exceptionally and unjustifiably long time" to amend its Rule 65 *ter* Exhibit List and it has not shown good cause for amending its list.³⁴

for Trial Chamber's Decision to Exclude the Evidence of Witness 55 Under Rule 89(D) and Deny his Testimony Pursuant to Rule 92 *quater*, 14 December 2007 ("*Haradinaj* 14 December 2007 Decision"), para. 8.

²⁵ *Ibid.*, paras. 20, 21.

²⁶ *Ibid.*, paras. 20, 22–23.

²⁷ *Ibid.*, paras. 20, 24.

²⁸ *Ibid.*, para. 28, referring to *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, para. 94 (stating that "[t]he Appeals Chamber is hesitant to base any decision on Mr. Deronjić's testimony without having corroborating evidence. The discrepancies in the evidence given by Mr. Deronjić and the ambiguities surrounding some of the statements he made [...] caution the Appeals Chamber against relying on his evidence alone").

²⁹ *Ibid.*, para. 28, referring to *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgement, 30 March 2004, para. 35. *See also*, paras. 28, 252 and 253, and the Dissenting Opinion of Judge Schomburg, paras. 2, 12, 9(d), 15 and 16, which also explore Deronjić's unreliability. *Ibid.* para. 28.

³⁰ *Ibid.*, para. 30.

³¹ *Ibid.*, para. 38.

³² *Ibid.*, para. 39.

³³ *Ibid.*, para. 41.

³⁴ *Ibid.*, para. 41.

2. Nikolić Response

15. Nikolić requests that the Motion be denied. In particular, he submits that the Trial Chamber should deny the Prosecution's request to amend its Rule 65 *ter* Lists of Witnesses and Exhibits and consequently deny the Prosecution's request to admit the four deceased's evidence pursuant to Rule 92 *quater*. In the alternative, Nikolić requests that the Trial Chamber deny the Prosecution's request in relation to, at a minimum, the evidence of B-161 concerning his alleged visit to the Zvornik Brigade Command in July 1995.³⁵

16. Nikolić also requests leave to exceed the word-limit.³⁶

17. Nikolić submits that the evidence sought to be admitted through the Motion does not meet the requirements of Rule 92 *quater*.³⁷ Nikolić focuses on the proposed testimony of B-161, but joins the submissions of the other Accused in opposing the admission of the proposed evidence of all four deceased witnesses.³⁸

18. Nikolić submits that the untimely submission of the Motion inappropriately prejudices the Defence and for this reason alone should be denied.³⁹ To grant the Prosecution request to amend its Rule 65 *ter* List of Witnesses and Exhibits at this time would be contrary to the right of the Accused to be informed promptly and in detail of the nature and cause of the charges against him pursuant to Article 21(4)(a) of the Statute, infringe his right to know the case he has to meet at the time of the preparation of the Defence case, and contravene his right to be tried without undue delay, as enshrined in Article 21 (4) (c) of the Statute.⁴⁰

19. Nikolić submits that B-161's evidence:

(a) goes to the acts and conduct of the Accused;⁴¹

(b) relates to an event and/or material fact that was not alleged in the Indictment—that Nikolić personally participated in the executions—which augments his level of responsibility;⁴²

³⁵ Nikolić Response, paras. 1, 2, 34, 35, 139.

³⁶ *Ibid.*, para. 6.

³⁷ *Ibid.*, para. 3.

³⁸ *Ibid.*, para. 4. Nikolić submits that in exercising its discretion to admit the evidence which goes to the acts and conduct of the accused pursuant to Rule 92 *quater*, the Trial Chamber must take into consideration the requirements set out by Rules 92 *quater* and 89, as well as the "circumstances of the particular case". *Ibid.*, paras. 41, 42, referring to *Prosecutor v. Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*, 7 June 2002, para. 13. *See also, Ibid.*, paras. 61–71.

³⁹ *Ibid.*, para. 10.

⁴⁰ *Ibid.*, paras. 12–14. Nikolić submits, *inter alia*, that if any of B-161's evidence is admitted, he would need to recall 11 Prosecution witnesses and to be provided additional time to prepare the case for the Defence. *Ibid.*, paras. 15–16, 136–137.

⁴¹ *Ibid.*, para. 74.

(c) is not reliable as the witness was not effectively cross-examined,⁴³ and there is no other evidence which corroborates his testimony⁴⁴ since the corroborating protected witness who testified in the present case, is purportedly not credible and his evidence not reliable,⁴⁵ and, in any event, his evidence does not corroborate but actually contradicts the proposed evidence of B-161;⁴⁶

(d) has little if any relevance and probative value;⁴⁷ and

(e) is such that considered together with the sum of the evidence admitted on the record, it would not allow the Trial Chamber to draw any negative inference beyond any reasonable doubt.⁴⁸

20. He also argues that even if the Trial Chamber concludes that the testimony of B-161 has some probative value, such probative value is substantially outweighed by the need to ensure a fair trial.⁴⁹

3. Borovčanin Response

21. Borovčanin opposes the admission of Deronjić's evidence. Borovčanin argues that counsel in the *Blagojević and Jokić* trial, while cross-examining Deronjić, was actively hostile to Borovčanin and did not properly test the reliability of potentially incriminating statements against him.⁵⁰ Borovčanin submits that the transcripts in the *Blagojević and Jokić* trial are not sufficiently cumulative with other evidence, or internally consistent, to warrant admission.⁵¹ He argues that the Trial Chamber should not *proprio motu* separate portions of statements which are deemed admissible from inadmissible portions of the material.⁵²

22. Borovčanin also argues that if the Prosecution seeks to have Deronjić's testimony in the *Milošević, Nikolić and Krstić* cases admitted as evidence in this case, each of those transcripts

⁴² *Ibid.*, para. 18. It is submitted that this allegation is not corroborated but is in fact contradicted by testimony heard by the Trial Chamber to this day. *Ibid.*, paras. 18–20.

⁴³ *Ibid.*, paras. 76–88. Nikolić submits, among other things, that the cross-examination was led by Accused Milošević who represented himself; that the questions Milošević posed were evidently not driven by the interests of Nikolić; that Milošević did not ask [B-161] any question in relation to the alleged July 1995 events in Zvornik; and a number of questions that could and should have been asked to properly test and challenge his evidence were left out. *Ibid.*, paras. 79, 82–85. See also, Annex 2 of Nikolić Response.

⁴⁴ *Ibid.*, para. 89.

⁴⁵ *Ibid.*, paras. 91–95.

⁴⁶ *Ibid.*, para. 98.

⁴⁷ Nikolić further submits that the probative value of B-161's evidence is affected by the fact that the witness was a "murky character", who was involved in criminal activities. Nikolić Response, paras. 113–123. Also, Nikolić points to examples of B-161's lack of credibility and contradictions between B-161's and the testimony of a protected witness in the present case. *Ibid.*, 124–133.

⁴⁸ *Ibid.*, para. 33.

⁴⁹ *Ibid.*, paras. 136–138.

⁵⁰ Borovčanin Response, paras. 8–14.

⁵¹ *Ibid.*, paras. 23–27.

⁵² *Ibid.*, paras. 28–29.

must independently satisfy the Rule 92 *quater* requirements. The Motion is alleged to be an “obvious attempt to circumvent those requirements, and is procedurally improper.”⁵³

23. Regarding exhibits and related materials referenced in *Blagojević and Jokić* in connection with Deronjić’s testimony, Borovčanin argues that, should the Trial Chamber determine that any portion of the *Blagojević and Jokić* transcript is admissible pursuant to Rule 92 *quater*, only those documents identified and explained by the witness should be admitted. Should the Trial Chamber allow exhibits used for impeachment to be admitted, then only those specific extracts should be admitted and, even then, not as proof of their content.⁵⁴

4. Gvero Response

24. Gvero opposes the Motion by relying upon the “generality of the legal submissions” contained in the responses filed by other Accused.⁵⁵

C. Reply

25. On 28 February 2008 the Prosecution filed a motion seeking leave to reply to the Borovčanin, Beara and Miletić, and Nikolić Responses and request for leave to file the response on 3 March 2008 (“Motion Seeking Leave to Reply”).⁵⁶ On 3 March 2008, the Prosecution filed its reply (“Reply”).⁵⁷ The Prosecution also seeks leave to exceed the word-limit.⁵⁸

26. The Trial Chamber has considered all arguments included in the Reply.

D. Nikolić Sur-Reply

27. On 10 March 2008, Nikolić filed confidentially a motion seeking leave to file a sur-reply and submitted a sur-reply (“Nikolić Sur-Reply”).⁵⁹

⁵³ *Ibid.*, para. 22.

⁵⁴ *Ibid.*, para. 30.

⁵⁵ Gvero Response, paras. 1–2.

⁵⁶ Prosecution’s Motion Requesting Leave to Reply to the Borovčanin, Beara, Miletić and Nikolić Responses to the Prosecution’s Rule 92 *quater* Motion, and Request for Leave to File the [Reply] on 3 March 2008, confidential, 28 February 2008 (“Motion Seeking Leave to File a Reply”).

⁵⁷ Prosecution’s Consolidated Reply to Defence Responses to Prosecution’s Motion to Admit the Evidence of [B-161], Bojanović, Marić, and Deronjić Pursuant to Rule 92 *quater*, confidential, 3 March 2008 (“Reply”).

⁵⁸ Reply, para. 2. The Prosecution submits that it is “in the interests of justice that the Prosecution be allowed to address [the Accused’s arguments] as comprehensively and adequately as possible with a view to assisting the Trial Chamber in its determination of a fair and just decision”. *Ibid.*

⁵⁹ Motion on Behalf of Drago Nikolić Seeking Leave to File a Sur-Reply to the Prosecution’s Consolidated Reply to Response on Behalf of Drago Nikolić to Prosecution’s Motion to Admit the Evidence of [B-161], Bojanović, Marić, and Deronjić Pursuant to Rule 92 *quater*, confidential, 10 March 2008 (“Nikolić Sur-Reply”).

II. APPLICABLE LAW

A. Rule 92 quater

28. Rule 92 *quater* governs the admissibility of evidence of unavailable persons and provides:

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

29. Thus, Rule 92 *quater* requires that two conditions be cumulatively satisfied, the unavailability of a person whose written statement or transcript is sought to be admitted, and the reliability of the evidence therein.⁶⁰

30. The Trial Chamber must also ensure that the general requirements for admissibility of evidence in Rule 89 are satisfied and the proffered evidence is relevant and has probative value as provided in Rule 89(C). The Trial Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D) and thereby not unduly prejudicial.⁶¹

31. Trial Chambers have identified the following factors as relevant to the assessment of the reliability of the evidence to be admitted pursuant to Rule 92 *quater*: (a) the circumstances in which the statement was made and recorded, including (i) whether the statement was given under oath; (ii) whether the statement was signed by the witness with an accompanying acknowledgement that the statement is true to the best of his or her recollection; (iii) whether the statement was taken with the assistance of an interpreter duly qualified and approved by the Registry of the Tribunal; (b) whether the statement has been subject to cross-examination; (c)

⁶⁰ See, for example, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Decision on the Prosecution Motion for Admission of Evidence Pursuant to Rules 92 *bis* and *quater* of the Rules, 2 November 2006 ("Prlić Decision"), para. 8; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *quater*, 16 February 2007 ("Milutinović et al. Decision"), para. 4; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 9 July 2007 ("Delić Decision"), p. 4.

⁶¹ *Milutinović et al. Decision of 16 February 2007*", paras. 4, 6, referring, *inter alia*, to *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecutor's Second Motion for the Admission into Evidence of Written Statement by Deceased Witness Bajram Šopi, Pursuant to Rule 92 *bis*(C), 18 April 2002 ("Galić Decision"), p. 3. See also, for example, *Delić Decision*, p. 4.

whether the statement, in particular an unsworn statement never subject to cross-examination, relates to events about which there is other evidence; and (d) other factors, such as the absence of manifest or obvious inconsistencies in the statements.⁶²

32. The Trial Chamber also notes that Rule 92 *quater*(B) specifically provides that, if the evidence goes to proof of acts and conduct of the accused, that may be a factor against the admission of such evidence, or part of it. The Trial Chamber considers that this provision is inflected with concern for ensuring a fair trial and the reliability of the evidence. This provision counsels cautious scrutiny with respect to evidence going to proof of acts and conduct of the accused but also contemplates the admission of statements by deceased persons containing such evidence.

33. The Trial Chamber notes that “exhibits accompanying transcripts form an inseparable and indispensable part of the testimony and can be admitted”.⁶³

B. Amendments of Rule 65 *ter* Witnesses and Exhibits list

34. Rule 73 *bis* (F) provides that: “[a]fter commencement of the trial, the Prosecutor may file a motion to vary [...] the number of witnesses that are to be called [...] and the Trial Chamber may grant the Prosecutor’s request if satisfied that this is in the interests of justice”.

35. The Trial Chamber has previously held that in exercising its discretion under Rule 73 *bis* (F), it should balance the Prosecution’s duty to present the available evidence to prove its case with the right of the accused to have adequate time and facilities to prepare a defence and to be tried without undue delay. In striking a balance between these two competing interests, at this stage of the proceedings, the Trial Chamber should primarily consider whether the rights of the Accused will be adequately protected if witnesses and/or exhibits are added to the Prosecution Witness List and/or Exhibit List, respectively.⁶⁴

36. The Trial Chamber may also take into account additional criteria, including whether the proposed evidence is *prima facie* relevant and of probative value to issues raised in the indictment,

⁶² *Milutinović et al.* Decision, para. 7, referring, *inter alia*, to *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, 16 February 1999; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, (“*Kordić and Čerkez* Appeals Decision”), para. 27; *Galić* Decision, pp. 3–4. *See also*, for example, *Delić* Decision, p. 4.

⁶³ *See e.g.*, *Delić* decision, p. 4, referring to *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Decision Regarding Prosecutor’s Notice of Intent to Offer Transcripts Under Rule 92 *bis* (D), 9 July 2001, para. 8.

⁶⁴ *See*, for example, Decision on Prosecution’s Motions for Leave to Amend Rule 65 *ter* Witness List and Rule 65 *ter* Exhibit List, confidential, 6 December 2006 (“Decision of 6 December 2006”), p. 6 (footnotes omitted); Decision on Prosecution’s Motion for Leave to Amend 65 *ter* Exhibit List with Nine Exhibits, confidential, 29 August 2007, p. 2.

and whether good cause for amending the witness list and/or exhibit list has been shown, taking into consideration such elements as the complexity of the case and on-going investigations.⁶⁵

III. DISCUSSION

37. As a preliminary matter, the Trial Chamber notes that the “Practice Direction on the Length of Briefs and Motions” provides that motions, responses and replies shall not exceed 3,000 words. A party seeking authorisation to exceed this limit must do so in advance and “provide an explanation of the exceptional circumstances that necessitate this oversized filing.”⁶⁶ The Motion, Responses and Reply substantially exceed the prescribed limit.⁶⁷ The Trial Chamber grants the parties’ requests to exceed the word limit because the present submissions deal with an important issue. The Trial Chamber reiterates to the parties, however, the importance of adhering to word limits, as well as to the procedure prescribed in the “Practice Direction on the Length of Briefs and Motions”.

A. Amendments of Rule 65 *ter* Witnesses and Exhibits List

38. The Trial Chamber notes that the Prosecution could have and should have filed the Motion earlier and the failure to do so is regrettable. The Trial Chamber considers, however, that the four witnesses were listed in the Prosecution’s Confidential Provisional Witness List of 16 December 2005 and that all except for B-161 were included in the Prosecution’s Rule 65 *ter* Witness List filed on 28 April 2006. B-161 was removed as he had died before the list was filed. Between 18 April and 11 July 2007, the Accused became aware of the Prosecution’s intention to file a Rule 92 *quater* motion requesting the admission of the prior testimony of Marić,⁶⁸ B-161,⁶⁹ Bojanović⁷⁰ and Deronjić.⁷¹ The Trial Chamber is therefore satisfied that the Accused had known about the possibility of introduction of this evidence for considerable time and therefore received adequate notice concerning the proposed evidence. In addition, with regard to any prejudice caused by the late filing of the Motion, the Accused will have the opportunity to challenge the evidence during their defence case by calling other evidence. Further, if necessary and good cause is shown, they will have the opportunity to recall Prosecution witnesses for further cross-examination.

⁶⁵ See, for example, Decision of 6 December 2006, p. 7 (footnotes omitted). Further criteria are listed in fn. 41 of the aforementioned Decision.

⁶⁶ Practice Direction on the Length of Briefs and Motions, 16 September 2005, Section (C) 5 of IT/184 Rev. 2, paras. 5, 7.

⁶⁷ The Motion counts 6, 021 words; Nikolić Response counts 9,819 words; Beara and Miletić Response counts 6,719; the Reply counts 12,208 words.

⁶⁸ *Prosecutor v. Popović et al.*, Case No. IT-05-88, T. 10210 (18 April 2007).

⁶⁹ *Ibid.*, T. 11504–11505 (private session) (15 May 2007).

⁷⁰ *Ibid.*, T. 12837 (19 June 2007).

⁷¹ *Ibid.*, T. 13716–13717 (11 July 2007).

B. Rule 92 quater

39. Turning to the merits, the Trial Chamber is satisfied that the four deceased are unavailable persons within the meaning of Rule 92 *quater*.

40. As a general comment on the reliability of the proposed evidence, the Trial Chamber notes that the prior testimony of the four deceased witnesses were given in previous trials before this Tribunal. The witnesses were examined, cross-examined and re-examined, after having been sworn.

41. The Trial Chamber will discuss indicia of reliability with regard to the evidence of each of the four witnesses. In this respect, the Trial Chamber first notes that the various factors of reliability will be considered collectively when determining the ultimate reliability of a statement. The absence of one or more of these factors does not automatically lead to the exclusion of this evidence as it may be compensated for by the existence of other factors. The Trial Chamber stresses that where such evidence is admitted, the absence of one or more indicia of reliability will be taken into consideration when attributing the ultimate weight to that evidence.⁷²

42. The prior testimony of each of the four witnesses includes evidence that goes to proof of the acts and conduct of some of the Accused in the present case, namely Nikolić, Pandurević, Beara and Borovčanin. In accord with Rule 92 *quater* (B), the Trial Chamber considers this factor as weighing against admission. The ultimate determination about whether to admit the evidence despite this factor will be made based on an assessment of all the factors as a whole.

C. Bojanović

43. Bojanović, who occupied different posts in the Zvornik Brigade between 1992 and 1995, testified in the *Blagojević and Jokić* case on 8 and 9 July 2004.⁷³ His testimony deals, *inter alia*, with the organisation and structure of the Zvornik Brigade in 1995, the role of the Commander and security organ and the tasks, duties and responsibilities of the Duty Operations Officer. Bojanović also testified about Pandurević's departure for Srebrenica in early July, the events following the fall of Srebrenica on 11 July 1995, Pandurević's return to Zvornik on 15 July, and Pandurević dictating and initialling the Interim Combat Report of 15 July 1995.⁷⁴

⁷² See also, among others, *Prosecutor v. Rasim Delić*, Case No. IT-04-83-PT, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *Quater*, 9 July 2007 ("*Delić* Decision"), p. 5, and *Milutinović* Decision, paras. 8–12. *Ibid.*, paras. 5–8.

⁷³ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11668–11751 (8 July 2004); BT. 11752–11775 (9 July 2004).

⁷⁴ He also testified regarding his entry in the duty officer notebook on 23 July 1995 in which he wrote "Skelani have two injured Turks (they cut themselves with glass) I told them to kill them since Bratunac doesn't want to take

44. The Trial Chamber notes that Bojanović's evidence was given under oath and the witness was cross-examined. The evidence is in great part corroborated by other Prosecution witnesses, such as PW-168, Mihajlo Galić, Miodrag Dragutinović, and Richard Butler. The Trial Chamber is satisfied that the evidence is reliable for the purpose of its admissibility pursuant to Rule 92 *quater*.

45. Although Bojanović's testimony pertains to proof of the acts and conduct of the Accused Pandurević and Nikolić, the Trial Chamber is satisfied that his testimony, including the exhibits, is admissible pursuant to Rule 92 *quater*. The Trial Chamber has considered the cumulative nature of the evidence, the corroboration from other witnesses, and the fact that the testimony was elicited with the safeguards of prior judicial proceedings and subjected to cross-examination.

46. In addition, Bojanović's prior testimony also meets the requirements set out by Rule 89 as it is relevant to the present case and has probative value and its admission does not affect the fairness of the proceedings.

D. Marić

47. Marić, who in July 1995 held the rank of Captain and was an operations officer in the Zvornik Brigade, testified in the *Blagojević and Jokić* case on 6-7 July 2004.⁷⁵ His testimony mainly focused on the Brigade structure, the transfer of command to Obrenović when Pandurević departed for Srebrenica, the Operations Sector and functions of the Duty Operations Officer, and the days following the fall of Srebrenica, including Pandurević's return to Zvornik on 15 July.

48. The Trial Chamber notes that Marić testified under oath and was the subject of cross-examination. Further, there is corroborating evidence of much of his testimony coming from witnesses such as PW-168, Mihajlo Galić, Miodrag Dragutinović and Richard Butler. Considering these and other relevant considerations, the Trial Chamber is therefore satisfied that the evidence is reliable for the purpose of its admissibility pursuant to Rule 92 *quater*. Finally, although it contains evidence that goes to proof of the acts and conduct of the Accused Pandurević, the Trial Chamber is satisfied, that the evidence should be admitted. In reaching this conclusion, the Trial Chamber has considered especially the cumulative nature of the evidence, the corroboration from other witnesses, and the fact that the testimony was elicited with the safeguards of prior judicial proceedings and subjected to cross-examination. It is further notable that Pandurević has not

them." *Ibid.*, BT. 11760 (9 July 2004). Bojanović testified about witnessing the arrival of a telegram from the Main Staff in July 1995 in which Nikolić complained about the commander's interference in their affairs and stated that the security organ should straighten out their relations and carry on with its duties and tasks without much involvement on the part of the commander. *Ibid.*, BT. 11683 (8 July 2004).

⁷⁵ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, BT. 11542-11572 (6 July 2004); BT. 11573-11667 (7 July 2004).

opposed the admission of the evidence. Considering all of these factors, the Trial Chamber is satisfied that Marić's testimony, including the exhibits accompanying the transcripts, can be admitted pursuant to Rule 92 *quater*.

49. Further, the requirements set out by Rule 89 (C) and (D) are also met given the nature of Marić's evidence.

E. B-161

50. B-161, testified in the *Milosević* case on 22-23 May and 2 July 2003.⁷⁶ The relevant portion of B-161's testimony concerns events at a crime site and an event pertaining to the acts and conduct of two Accused, Nikolić and Beara.

51. With regard to the reliability of B-161's evidence—which has been challenged by Nikolić, Beara and Miletić—the Trial Chamber notes that the witness testified under oath. His account of the relevant events was subjected to cross-examination and his credibility was generally questioned and tested and those challenges appear on the record. In any event, the Trial Chamber notes that whether the cross-examination fully and effectively probed the witness's account is a question that goes to the weight to be attributed to the evidence rather than to its admissibility.

52. The Accused also claim that B-161's evidence lacks corroboration. The Trial Chamber first stresses that, as mentioned above, corroboration is simply a factor to take into consideration as to the reliability of the evidence and not a requirement for admissibility under Rule 92 *quater*. Therefore, the lack of corroboration does not automatically preclude the admission of the evidence if the Trial Chamber is satisfied that the requirements for admission as prescribed under Rule 92 *quater* and Rule 89 are met. In this instance, the Trial Chamber acknowledges that not every part of B-161's testimony is corroborated. In particular, he is alone in recounting the content of an alleged conversation that is particularly incriminating in relation to one of the accused. However there is corroborating evidence that the alleged conversation took place and with regard to the circumstances surrounding it.⁷⁷ Further, there is corroboration for other parts of his testimony, for example, in the evidence of witnesses who have testified about the detention of prisoners at the Ročević School.⁷⁸ All of this corroborating evidence was subjected to challenge by way of cross-

⁷⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, MT. 21002-21104 (private session in portions) (22 May 2003); MT. 21105-21134 (private session in portions) (23 May 2003); MT.23619-23683 (closed session) (2 July 2003); Ex. P00450, Tab. 1, "Pseudonym Sheet and Summary of Witness's Background and Curriculum Vitae", p. 1.

⁷⁷ Corroborating evidence was given by a protected witness in the present case, indicated in the confidential submissions of the parties.

⁷⁸ See, for example, Milorad Birčaković, Srećko Ačimović, PW-165, PW-142, PW-143.

examination. The Trial Chamber has considered all these points when making its assessment of the degree of corroboration for the testimony of this witness.

53. Having considered all of the factors outlined above, the Trial Chamber is satisfied that B-161's evidence is sufficiently reliable for the purpose of its admissibility pursuant to Rule 92 *quater*.

54. The Trial Chamber is further satisfied that the proffered evidence of B-161 is relevant, although not all of it, to the present case and has probative value.

55. The Trial Chamber also notes that, contrary to Nikolić's claim, the relevant portion of B-161's testimony dealing with the alleged conversation does not expand the charges against Nikolić, but falls within the scope of the allegations in the Indictment against him.

56. Allegations levied by Nikolić concerning B-161's supposed character and background that he claims undermines credibility are matters to be considered in assessing the weight to accord the evidence.

57. Finally, the Trial Chamber has considered that B-161's testimony pertains to proof of the acts and conduct of the accused. However, when considered in combination with all of the other factors surrounding this evidence as outlined above, the Trial Chamber is satisfied that B-161's testimony, including the exhibits accompanying the transcripts, can be admitted pursuant to Rule 92 *quater*. In reaching this conclusion the Trial Chamber has considered, *inter alia*, that the evidence was given in a prior judicial proceedings, it was the subject of cross examination and there is corroborative evidence with regard to parts of his testimony.

F. Deronjić

58. Deronjić, who in 1995 served as President of the SDS branch in the municipality of Bratunac, Civilian Commissioner for the Serbian municipality of Srebrenica, and President of the War Presidency of the municipality of Srebrenica-Skelani⁷⁹, testified in the *Blagojević and Jokić* trial on 19–22 January 2004.⁸⁰ Deronjić's testimony includes evidence pertaining to proof of the acts and conduct of the Accused Pandurević, Borovčanin, and Beara, including the whereabouts of Pandurević and Borovčanin in July 1995 and Beara's alleged visit to and conversation with Deronjić's in his office in Bratunac in the evening of 13 July 1995.

⁷⁹ Miroslav Deronjić, BT. 6373 (21 January 2004); BT. 6136–6137 (19 January 2004); BT. 6138, 6143 (19 January 2004).

⁸⁰ Miroslav Deronjić, BT. 6131–6207 (19 January 2004), BT. 6216–6300 (20 January 2004), BT. 6305–6392 (21 January 2004), BT. 6398–6510 (22 January 2004).

59. The Trial Chamber notes that Deronjić took an oath and was cross-examined. The cross-examination probed issues relevant to the defence in the current proceedings, namely Deronjić's meeting with Beara on 13 and 14 July 1995 and his dealings and communications with Borovčanin.

60. The claims that cross-examination was conducted by a counsel with different interests or "hostile" to the Accused can be considered in assessing the weight to be assigned to the testimony. The same conclusion applies to the claim concerning Deronjić's plea negotiations with the Prosecution.

61. The Accused Beara, Miletić, Borovčanin, and Gvero claim that Deronjić's evidence is so inconsistent as to make it unreliable. The Trial Chamber acknowledges that Deronjić's evidence contains a number of inconsistencies, admissions of prior false statements, and includes uncorroborated claims. This is not disputed by the Prosecution. The Trial Chamber notes that Deronjić was cross-examined in the *Blagojević and Jokić* trial and that he responded to the challenges to the truthfulness and reliability of his evidence and the transcript clearly reflects those challenges and his responses. Further there is a clear record of the findings of the Trial Chamber and the Appeals Chamber as to the credibility and reliability of Deronjić's evidence. In these circumstances, the Trial Chamber is satisfied that the inconsistencies in the testimony of Deronjić go to the weight to be attributed to the evidence but do not preclude its admission.

62. With respect to corroboration, the Trial Chamber reiterates that this is simply a factor to take into consideration for the reliability of the evidence and not a requirement for admissibility under Rule 92 *quater*. The Trial Chamber notes that there is corroborative evidence of part of Deronjić's testimony such as that relating to the meeting at the Hotel Fontana on 12 July⁸¹ and the whereabouts of some of the accused at key intervals.⁸² With reference specifically to the Accused Borovčanin, there is corroborative evidence in relation to much of Deronjić's testimony about him for example with respect to Borovčanin's presence at Srebrenica and his alleged knowledge as to the events at the Kravica warehouse.⁸³ What is uncorroborated is his evidence as to the specifics of the meeting and conversation between him and Beara on 13 July. However, there is evidence placing Beara at Deronjić's office and in general in Bratunac during those days.⁸⁴ The Trial Chamber has considered all these points when making its assessment on the degree of corroboration of Deronjić's evidence.

⁸¹ See, e.g., Pieter Boering, Exhibit P02047 ("Srebrenica Trial Video").

⁸² See, e.g., PW-160, Zoran Petrović (with regard to Borovčanin), and Miodrag Dragutinović (with regard to Pandurević).

⁸³ See, e.g., Zoran Petrović, Ex. P02054 (Zoran Petrović's video), PW-161, Ex. P02852, P02853 (Borovčanin's statement).

⁸⁴ See, e.g., PW-161, Zlatan Čelanović.

63. Having considered all these factors, the Trial Chamber is satisfied that Deronjić's evidence bears sufficient indicia of reliability for the purpose of admission pursuant to Rule 92 *quater*.

64. The Trial Chamber is further satisfied that the evidence is relevant to the present case and has probative value. Though Deronjić's testimony pertains to proof of the acts and conduct of multiple accused, the Trial Chamber is satisfied that when considered in relation to all of the other factors outlined above, it can be admitted pursuant to Rule 92 *quater*. In reaching this conclusion, the Trial Chamber has considered among other things the extensive and multiple cross examinations of him and the availability of a full record of his evidence and the challenges to it, the corroborative evidence which exists in relation to substantial parts of his testimony and the fact that the testimony was elicited with the safeguards of prior judicial proceedings.

65. Regarding the exhibits the Prosecution seeks to be admitted together with Deronjić's testimony in the *Blagojević and Jokić* trial, the Trial Chamber agrees with Borovčanin that only those documents which were used and explained by the witness in court are admissible pursuant to Rule 92 *quater*. In particular, the Trial Chamber notes that during Deronjić's testimony in the *Blagojević and Jokić* trial, parts of his prior statements and transcripts in the *Milošević, Nikolić* and *Krstić* cases were used to challenge his credibility. This however does not mean that those earlier transcripts and statements in their entirety should also be admitted in these proceedings pursuant to Rule 92 *quater*. As advanced by Borovčanin, for this to be considered, each of the statements and transcripts would need to be submitted individually under Rule 92*quater*. Therefore, the Trial Chamber finds that only those portions of Deronjić's prior statements and transcripts specifically referenced in court shall be admitted. This will include any parts read in, which automatically will be part of the record, and any portion of Deronjić's prior statements and transcripts in the *Milošević, Nikolić* and *Krstić* cases which were used for impeachment purposes but were not read out *verbatim* and thus do not appear in the *Blagojević and Jokić* transcript. In relation to the latter category of excerpts, they will be admitted, provided that the Prosecution identifies them and provides a copy to the Trial Chamber.

G. Conclusion

66. For the foregoing reasons, the Trial Chamber concludes that the proffered evidence is admissible under Rule 92 *quater* and Rule 89. The Trial Chamber notes that, as is always the case, a decision on admissibility must be distinguished from a determination as to the weight to be given to any piece of evidence. In this instance, the Trial Chamber will bear in mind in particular the absence of the opportunity to cross-examine in the current trial when evaluating this evidence and

deciding on the weight to be attributed to the transcripts, in accordance with the jurisprudence of the Tribunal.⁸⁵

IV. DISPOSITION

For these reasons, pursuant to Rules 89 and 92 *quater*, the Trial Chamber hereby **GRANTS** the Motion in part, and **ORDERS** as follows:

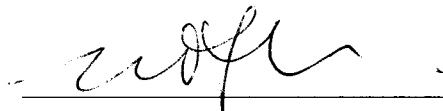
- (1) The Prosecution, Nikolić, Beara and Miletić are granted leave to exceed the word-limit in their Motion, Reply and Responses, respectively;
- (2) The Prosecution is granted leave to file the Reply and Nikolić is granted leave to file the Sur-reply;
- (3) Bojanović's testimony, Marić's testimony, B-161's testimony and Deronjić's testimony shall be admitted;
- (4) Bojanović's exhibits, Marić's exhibits, B-161's exhibits shall be admitted;
- (5) With regard to Deronjić's exhibits:
 - (i) only those documents which were used and explained by the witness in court, as well as those portions of his prior statements and transcripts in the *Milošević*, *Nikolić* and *Krstić* cases which were specifically referenced in court shall be admitted;
 - (ii) the Prosecution shall identify and file those portions of the transcripts from the *Milošević*, *Nikolić* and *Krstić* cases that were used for impeachment purposes but were not read out *verbatim* and thus do not appear in the *Blagojević and Jokić* transcript;
- (6) The Prosecution is granted to leave to amend its Rule 65 *ter* Witness List and Exhibit List accordingly;

⁸⁵ See *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal concerning Rule 92 *bis* (C), 7 June 2002, fn. 34, referring to Judgements of the European Court for Human Rights. See also, for example, *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Request to Have Written Statements Admitted Under Rule 92 *bis*, 21 March 2002, para. 7; *Milutinović* Decision, para. 13; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals Against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007, in particular paras. 50–61.

and **INSTRUCTS** the Registrar to assign a pseudonym in this case to the witness referred to in Case No. IT-02-54-T as B-161.

The Motion is denied in all other respects.

Done in English and French, the English text being authoritative.



Carmel Agius
Presiding

Dated this twenty-first day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]